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Supreme Court, U.S.
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No. 90-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNA IRENE LEWIS,
Petitioner,

vs.

PEARSON FOUNDATION, INC., et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS MOTHER AND UNBORN BABY CARE OF ST. LOUIS D/B/A AAA PREGNANCY CENTER, RITA ROBERSON, MARIE BECKER, MARY ELIZABETH KRETSCHMER, SUSAN SCHLESINGER AND THOMAS ROHAN

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by petitioner, would be presented for review in this case:

I. Whether this Court is without jurisdiction to review petitioner's Petition for Writ of Certiorari in that this Petition has not been filed within the period allowed by law?

II. Whether the District Court erred in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any state action in the alleged conspiracy in order to properly plead a cause of action under 42 U.S.C. Section 1985(3) where, as in this case, the right allegedly violated is a right protected only against governmental interference rather than private interference?

III. Whether the District Court erred in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any racial or other class-based invidiously discriminatory animus behind the alleged conspiratorial actions of defendants thus failing to allege a claim protected by 42 U.S.C. Section 1985(3) and therefore the District Court did not have subject matter jurisdiction?

IV. Whether the District Court erred in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because the abortion right from which plaintiff bases her complaint exists solely by reason of *Roe v. Wade*, 410 U.S. 133 (1973), which was wrongly decided, and thus plaintiff was not, or cannot be, denied equal privileges and immunities of the laws under 42 U.S.C. Section 1985(3), and therefore the District Court did not have subject matter jurisdiction?

LIST OF PARTIES

Respondents hereto are individuals with the exception of Mother and Unborn Baby Care of St. Louis which did business as AAA Pregnancy Problem Center. In compliance with Supreme Court Rule 29.1, there are no parent companies or subsidiaries of said corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PERCEIVED MISSTATEMENTS OF FACT OR LAW	1
REASONS FOR DENYING THE WRIT	3
I. This Court is without jurisdiction to review petitioner's Petition for Writ of Certiorari in that this Petition has not been filed within the period allowed by law.	3
II. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any state action in the alleged conspiracy in order to properly plead a cause of action under 42 U.S.C. Section 1985(3) where, as in this case, the right allegedly violated is a right protected only against governmental interference rather than private interference.	5
III. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any racial or other class-based	

invidiously invidiously discriminatory animus behind the alleged conspiratorial actions of defendants thus failing to allege a claim protected by 42 U.S.C. Section 1985(3) and therefore the District Court did not have subject matter jurisdiction. 7

IV. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because the abortion right from which plaintiff bases her complaint exists solely by reason of *Roe v. Wade*, 410 U.S. 133 (1973), which was wrongly decided, and thus plaintiff was not, or cannot be, denied equal privileges and immunities of the laws under 42 U.S.C. Section 1985(3), and therefore the District Court did not have subject matter jurisdiction. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases:

Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) 2,8

Doe v. Bolten, 410 U.S. 179 (1973) 9

Federal Trade Commission v. Minneapolis-Honeywell Regulator Company, 344 U.S. 206 (1952) 4

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978) 6

Griffin v. Breckenridge, 403 U.S. 88 (1971) 7,8

Griswold v. Connecticut, 381 U.S. 479 (1965) 9

National Organization for Women v. Operation Rescue, 726 F. Supp. 1483 (1989) 8

Roe v. Wade, 410 U.S. 113 (1983) 6,8,9,10

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 9

United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott, 463 U.S. 825 (1983) 2,5,6,7,8,9,10

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 9

STATUTES:

42 U.S.C. Section 1985(3) 2,5,6,7,8,9,10

Cong. Globe, 42d Cong. 1st Sess., App. 68, 115, 153, 188, 315 (1871) 8

RULES:

Supreme Court Rule 13.4 3

Eighth Circuit Rule 40A(b)(2) 3

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PERCEIVED MISSTATEMENTS OF FACT OR LAW

1. Since the United States Court of Appeals for the Eighth Circuit issued its en banc order on October 24, 1990 affirming the judgment of the District Court as recorded at

917 F.2d 1077 and as further reprinted in the Appendix at page A-1 of petitioner's Brief, petitioner's Petition for Writ of Certiorari was not timely filed, not being filed with this Court until April 10, 1991 and therefore should be dismissed. See Reason I.

2. Petitioner alleges, in Reason I for the granting of this Writ, that the issues involved here are "substantially similar" to the issues involved in *Bray v. Alexandria Women's Health Clinic* which is incorrect in that *Bray* involved the underlying fundamental right to travel, which is protected from not only governmental interference but also private interference which is not at issue in this case therefore presenting an entirely different issue for review, specifically being the absence of state interference in this case as mandated by this Court's decision of United *Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 463 U.S. 825 (1983) and 42 U.S.C. Section 1985(3).

REASONS FOR DENYING THE WRIT

I. This Court is without jurisdiction to review petitioner's Petition for Writ of Certiorari in that this Petition has not been filed within the period allowed by law.

As referenced beginning on page 2 of petitioner's Petition, through a footnote, the United States Court of Appeals for the Eighth Circuit, in its en banc order, filed October 24, 1990, ruled, through an equally divided court, that the judgment of the Honorable Edward L. Filippine, United States District Judge, was affirmed.

Per Supreme Court Rule 13.4, the time for filing a Petition for a Writ of Certiorari runs from the date of judgment or decree sought to be reviewed, which, in this case, would be the above referenced order of October 24, 1990. If, however, a Petition for Rehearing is timely filed with the Eighth Circuit, the Petition for Writ of Certiorari would be delayed and run from the date of the denial of the Petition for Rehearing. Sup. Ct. R. 13.4.

Petitioner filed, on November 6, 1990, "Plaintiff-Appellant's Petition for Rehearing" asking the "five Judges voting for affirmance to reconsider" the Eighth Circuit's en banc order of October 24, 1990. *See* Plaintiff-Appellant's Petition for Rehearing, page 5. On December 7, 1990, Appellant's Suggestions for Rehearing en banc was denied. In accordance with Eighth Circuit Rule 40A(b)(2) said Petition was automatically deemed to include a Petition for Rehearing by the panel, which was also denied per order of December 7, 1990. *See* Petitioner's Petition page A-33.

Per request of petitioner, the court amended its order of December 7, 1990, by striking the last full sentence of said order, through order dated December 17, 1990. *See* petitioner's Petition page A-34. Petitioner, still not being satisfied with the form

of the order, again sought a modification of said order by letter to the Eighth Circuit Clerk which resulted in the Eighth Circuit's order of January 10, 1991, vacating the previous orders and denying appellant's Petition for Rehearing. *See* petitioner's Petition page A-35.

As referenced by petitioner's correspondence to the Clerk of the Court, dated December 17, 1990, requesting clarification of the court's orders, clearly, petitioner's request for said clarification was to delay the ninety (90) day period for the filing of petitioner's Writ of Certiorari to this court. *See* appendix page A-1 to this brief.

As further referenced by petitioner's correspondence, specifically the last paragraph, it was clear from the en banc order of December 7, 1990, by the Eighth Circuit, that it was the court's intention to deny petitioner's request, and accordingly, the ninety (90) day period for the filing of the Writ of Certiorari to this Court must have commenced on that date and hence the time for filing this Writ to this Court expired on March 7, 1990.

As so held by this Court in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206, 211 (1952), "we cannot hold that the time for filing a Petition for Certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had *no effect on the merits* of the decision that we are now asked to review in the Petition for Certiorari . . . Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *Id.* at 211 (emphasis added).

Although technical modifications were made through various subsequent orders by the United States Court of Appeals, clearly said modifications had no effect on the merits of the decision which is before this Court and petitioner's filing of her Writ of Certiorari to this Court is time barred and therefore should be dismissed for wanting of jurisdiction.

II. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any state action in the alleged conspiracy in order to properly plead a cause of action under 42 U.S.C. Section 1985(3) where, as in this case, the right allegedly violated is a right protected only against governmental interference rather than private interference.

As so held by this Court in *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 463 U.S. 825 (1983) (hereinafter referred to as *"Scott"*), state involvement is necessary to properly plead a cause of action under Section 1985(3) where the right allegedly violated is a right which is protected from governmental interference only rather than private interference. *Scott*, 463 U.S. at 833.

Plaintiff's cause of action was brought under 42 U.S.C. Section 1985(3) which reads, in pertinent part:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engage therein do or cause to be done, any act in furtherance of the object of said conspiracy, whereby another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or so deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. Section 1985(3) (1980).

In *Scott*, this Court held that Section 1985(3) provides no substantive rights in and of itself to the class allegedly conspired against but that the rights, privileges, and immunities being claimed under Section 1985(3) must be found elsewhere. *Scott*, 463 U.S. at 833. In *Scott*, plaintiffs asserted that defendants had conspired to deprive plaintiffs of their first amendment rights. This court held that because the first amendment only restrains official conduct, in order to properly plead a Section 1985(3) cause of action, it was necessary for plaintiffs to prove that the state was somehow involved in or affected by the conspiracy. Failure to do so would be fatal to plaintiffs' cause of action under Section 1985(3). *Id.*

In this case, plaintiff asserts her right to privacy, or right to an abortion, as recognized by *Roe v. Wade*, 410 U.S. 113 (1983), has been denied. The privacy right announced in *Roe v. Wade* is based upon the due process clause of the fourteenth amendment. *Roe v. Wade*, 410 U.S. at 153. The due process clause only protects individuals against governmental or official interference and not against private interference.

Bound by the decision in *Scott*, a showing of state interference or state action is required in order for plaintiff Lewis to properly plead and maintain a cause of action based upon Section 1985(3) on an underlying claim of right which is based upon the due process claim which protects only against state interference. Since plaintiff's right is found only through the due process clause, *Scott* requires state interference or state action which is not found here. Lastly, plaintiff's attempt to plead state action by alleging the Missouri Attorney General was involved in the conspiracy by depriving plaintiff of the "even-handed enforcement of the Missouri consumer protection laws and other legal protections prohibiting or remedying deceptive advertising practices" will not fulfill the requirement of state action under Section 1985(3). *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978).

Petitioner's complaint was properly dismissed for failure to state a cause of action upon which relief can be granted because petitioner's complaint failed to allege any state interference as mandated by Section 1985(3).

III. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because plaintiff's complaint failed to allege any racial or other class-based invidiously discriminatory animus behind the alleged conspiratorial actions of defendants thus failing to allege a claim protected by 42 U.S.C. Section 1985(3) and therefore the District Court did not have subject matter jurisdiction.

In order to fulfill the requirements of Section 1985(3) a class-based discriminatory animus must be pled by plaintiff. As held in *Scott*, the congressional purpose of Section 1985(3) was not to provide a general federal tort law for all citizens in the United States. *Scott*, 463 U.S. at 834. The original purpose of Section 1985(3) was to protect Blacks and Republicans from the Ku Klux Klan during the Reconstruction Era. This Court rejected the argument in *Scott* that workers who refused to join a union were a class of individuals intended to be protected by Section 1985(3). *Id.* at 837-39. This Court in *Scott* specifically held that Section 1985(3) will not extend to economic commercial animus. In fact, this Court expressed reservation as to whether Section 1985(3) was ever intended to "reach any class-based animus other than animus against Negroes and those who champion their cause, most notably Republicans." *Id.* at 836.

This Court has stated within *Scott*, 436 U.S. at 834, and also in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), that Congress in no way intended to create a general federal tort law through the adoption of Section 1985(3). Congress clearly recognized that

it lacked the authority to punish every "assault and battery" which was committed by two individuals within a state and, in fact, it was this belief that was the general opposition to the original bill. *See Griffin*, 403 U.S. at 101-102; *Scott*, 463 U.S. at 834; Cong. Globe, 42d Cong., 1st Sess., App. 68, 115, 153, 188, 315 (1871).

In *Griffin*, this Court expressed fear that Section 1985(3) might be interpreted as a general tort law and held that prospective plaintiffs under Section 1985(3) must allege an invidiously discriminatory motivation behind the conspirators' actions which must be racial, or *perhaps* otherwise class based. *Griffin*, 403 U.S. at 102. The only class which this Court has recognized to be within the guidelines of Section 1985(3) is racial ("the kind of invidiously discriminatory motivation stressed by sponsors of the limiting amendment.") *Id.* at 102.

Lastly, unlike *Bray*, and as recognized by the District Court in *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493 (1989) (the District Court opinion upon which certiorari was granted in *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991)), the fundamental right of a woman to obtain an abortion, if it exists, only is a right to be free of state interference. *See Scott*, 463 U.S. 825, 833. An important distinction between *Bray* and the instant case is the presence of the right to travel as the underlying right being infringed upon in *Bray* which is protected against not only governmental interference but also private interference as well thus not mandating the presence of state action which would be required here, since, as previously mentioned, *Roe v. Wade* protects individuals only against governmental or official interference and not private interference. Accordingly, petitioner's reliance upon *Bray*, in support of petitioner's urging of this Court's acceptance of its Writ of Certiorari, is misplaced.

IV. The District Court did not err in dismissing plaintiff's complaint for failing to state a claim for which relief can be granted under 42 U.S.C. Section 1985(3) because the abortion right from which plaintiff bases her complaint exists solely by reason of *Roe v. Wade*, 410 U.S. 133 (1973), which was wrongly decided, and thus plaintiff was not, or cannot be, denied equal privileges and immunities of the laws under 42 U.S.C. Section 1985(3), and therefore the District Court did not have subject matter jurisdiction.

As previously stated, Section 1985(3) does not, in and of itself, provide any substantive rights. *Scott*, 463 U.S. at 833. Accordingly, all rights, privileges and immunities that a prospective plaintiff seeks through enforcement of Section 1985(3) must be found elsewhere. In this case, plaintiff bases her alleged "abortion right" on the United States Supreme Court decision of *Roe v. Wade*, 410 U.S. 133 (1973) which held that the "right of privacy", *see Griswold v. Connecticut*, 381 U.S. 479 (1965), included a woman's decision whether or not to terminate her pregnancy.

Respondents herein respectfully submit that *Roe v. Wade* is wrongly decided and that the fourteenth amendment to the Constitution of the United States, whether under a substantive process or a right to privacy analysis, does not encompass the right to an abortion and therefore there can be no deprivation of the equal protection of the laws pursuant to 42 U.S.C. Section 1985(3) as alleged in plaintiff's complaint for failing to state a claim upon which relief can be granted in that the District Court did not have subject matter jurisdiction. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 782 (1986) (Burger, C.J., O'Connor, J., Rehnquist, J., and White, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 222 (1973)

(Rehnquist, J., dissenting); and *Roe v. Wade*, 410 U.S. 113, 171-178 (1973) (Rehnquist, J., dissenting).

If it is determined that plaintiff does not, in fact, have the "right to an abortion" then plaintiff's claim under 42 U.S.C. Section 1985(3) must fail as plaintiff would then be unable to allege a right, privilege or immunity to be protected from the alleged conspiracy of the defendants. *See generally, Scott*, 463 U.S. at 825.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

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314/645-2049

December 19, 1990

Office of the Clerk
United States Court of Appeals
for the Eighth Circuit
1114 Market Street
St. Louis, MO 63101
Attn: Michael Gans

Re: Warna Irene Lewis v. Pearson Foundation, Inc., et al.
No. 88-1293EM

Dear Mr. Gans:

I am the plaintiff-appellant's lawyer in the above-captioned case. I wrote to you on December 10 regarding the court's order of December 7, 1990, made in this case; a copy of the letter is attached for ease of reference.

Today I have received a copy of the court's order of December 17 amending the order of December 7 by striking its last full sentence. Therefore, left standing in the latter order is the part that says,

> Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges to rehear the case en banc.

As pointed out in my letter of December 10, the appellant has filed no suggestion for rehearing. Following the en banc order

of October 24, 1990, she filed a document titled and in substance a *petition for rehearing*. She has thus filed a request under FRAP 40 relating to a petition for rehearing and *not* under FRAP 35 relating to an en banc determination which may be requested by a party's filing of a suggestion. The rule 35 suggestion makes no sense where, as here, the rehearing is requested after the en banc court has already heard the case. The distinction between the two rules in the context of a filing made after an en banc decision is discussed in *Hitchcock v. Wainwright*, 777 F.2d 628 (11th Cir. 1985) (per curiam).

I do not want to seem to be making undue difficulty but the distinction between a petition for rehearing and a suggestion for rehearing en banc is critically important under Sup. Ct. R. 13.4, which tolls the time for the filing of a certiorari petition during the pendency of a petition for rehearing but not during the pendency of a suggestion for rehearing en banc.

Believing that there would be ninety days from the court's ruling on the petition for rehearing to decide whether to seek certiorari, consideration of that step did not start in earnest until receipt of the December 7 order. That decision entails consultation with the plaintiff and the ACLU, the organization sponsoring the suit, at both the local and national levels. It is feared that unless the December 7 order is amended to reflect the denial of the appellant's *petition for rehearing*, there court be great confusion and uncertainty and the generation of an unnecessary issue over when the appellant's ninety-day period for the filing of a certiorari petition began to run.

Assuming that in fact it was the court's intention to deny the request, which I must assume it was, it is therefore asked that the order of December 7, 1990, be further amended so as to clearly

show that it was the appellant's *petition for rehearing* that was denied.

Thank you.

Sincerely,

/s/ Tom Mendelson

c: Counsel of Record